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Hajemi bin Din & Ors v Elite Agriculture Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(NCVC)(A)-505–03 OF 2021
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND SUPANG LIAN JJCA
22 APRIL 2022

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Civil Procedure — Summary procedure — Application for — Respondent as registered lessee of land applied for summary procedure to obtain vacant possession against appellant — Whether there were triable issues — Whether action ought to commence by way of writ action — Rules of Court 2012 O 89

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The respondent ('plaintiff') was the registered lessee for 99 years of a lease over a land ('the land') which it had obtained from the registered proprietor of the freehold title to the land. The registered proprietor had obtained the title to the land after a successful application to the Pejabat Daerah dan Tanah Bera. The registered proprietor had in turn leased it to the plaintiff for the purpose of clearing the land for oil palm cultivation. The plaintiff's representative tried to enter the land but was prevented by the appellants ('defendants'). The first defendant was the headman of the community and the second defendant had been named as occupiers on the land. The plaintiff alleged that the defendants had refused to deliver vacant possession of the land to the plaintiff. The plaintiff filed an originating summons ('the OS') and invoked summary procedure under O 89 of the Rules of Court 2012 ('the ROC 2012'). The defendants in their affidavit to oppose the summary procedure had averred that the land was part of the customary land of the Semelai people. The learned High Court judge was of the view that: (a) the defendants merely asserted that the land was customary land without any documentary evidence substantiating that assertion; (b) the defendants did not provide any evidence that they were the aborigines of the Semelai tribe; (c) the plaintiff was the registered lessee of the land; and (d) the defendants having occupied the land without any license or consent of the state authority/state government, the said occupation was a trespass on the land in violation of the plaintiff's indefeasible lease interest in the land under s 340 of the National Land Code. The High Court concluded that there were no triable issues that the defendants had raised which merit a trial and so a vacant possession order was granted summarily to the plaintiff. Aggrieved, the defendants filed this appeal against the decision of the High Court.

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Held, allowing the appeal:

(1) Evidently this was not a clear case of trespass and that the defendants had shown that there were triable issues of law and fact. The conflict in affidavit evidence could only be resolved at the trial begun by a writ action and not via a summary procedure under O 89 of the ROC 2012. The learned High Court judge erred in law and in fact when he concluded that there were no issues worthy of a trial and that the summary procedure under O 89 of the ROC 2012 was rightly engaged for the purpose of an eviction order by the plaintiff as a registered lessee against the defendants, whom the learned judge found, were in illegal occupation of the land. As O 89 of the ROC 2012 was a special summary procedure for obtaining an eviction order, once it was found that the summary procedure was inappropriate, the proper order was not to convert the OS into a writ but to dismiss it with liberty to the plaintiff to file a writ action (see paras 35–37).

(2) Whether or not this was a case which required compensation in the matter of the rights of a registered proprietor and lessee vis a vis a community of aboriginal people occupying the land would be a matter that had to be resolved by way of a writ action where the proper parties were before the court. There were serious issues to be tried as disclosed in the affidavits and could only be fully and finally disposed of in an action by writ and not via a summary procedure under O 89 of the ROC 2012 (see para 59 & 70).

(3) Whether or not: (a) the state had knowledge or means of knowledge that some of the aborigines of the Semelai Tribe had settled on the *ungazetted* area; and (b) this was a case falling within the vitiating circumstance of a title acquired unlawfully by the current registered proprietor, would be a matter that had to be decided at the trial. It would be an abuse of the court's process to use O 89 of the ROC 2012 summary procedure for ostensibly a matter where the aborigines living on the land may be permanently deprived of their land without any compensation at all (see paras 83, 90 & 92).

[Bahasa Malaysia summary

Responden ('plaintif') adalah pemajak berdaftar selama 99 tahun pajakan ke atas tanah ('tanah') yang telah diperolehi daripada pemilik berdaftar hak milik pegangan bebas ke atas tanah tersebut. Pemilik berdaftar telah memperoleh hak milik tanah tersebut selepas permohonan berjaya kepada Pejabat Daerah dan Tanah Bera. Pemilik berdaftar pula telah memajakkannya kepada plaintif bagi tujuan membersihkan tanah untuk penanaman kelapa sawit. Wakil plaintif cuba memasuki tanah itu tetapi dihalang oleh perayu ('defendan'). Defendan pertama adalah ketua komuniti dan defendan kedua telah dinamakan sebagai penduduk tanah. Plaintif mendakwa bahawa defendan telah enggan menyerahkan milikan kosong tanah itu kepada plaintif. Plaintif memfailkan saman pemula ('OS') dan menggunakan prosedur terus di bawah

A 89 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Defendan-defendan dalam afidavit mereka untuk menentang prosedur terus itu telah menegaskan bahawa tanah itu adalah sebahagian daripada tanah adat orang Semelai. Hakim Mahkamah Tinggi yang bijaksana berpandangan bahawa: (a) defendan hanya menegaskan bahawa tanah itu adalah tanah adat tanpa sebarang keterangan dokumentari yang menyokong penegasan itu; (b) defendan tidak memberikan sebarang keterangan bahawa mereka adalah orang asli suku Semelai; (c) plaintif ialah pemajak berdaftar tanah itu; dan (d) defendan-defendan yang menduduki tanah tersebut tanpa sebarang lesen atau persetujuan pihak berkuasa negeri/kerajaan negeri, pendudukan tersebut adalah pencerobohan ke atas tanah yang melanggar kepentingan pajakan plaintif yang tidak boleh disangkal ke atas tanah di bawah s 340 Kanun Tanah Negara. Mahkamah Tinggi membuat kesimpulan bahawa tidak ada isu yang boleh dibicarakan yang dikemukakan oleh defendan yang patut dibicarakan dan oleh itu perintah pemilikan kosong telah diberikan secara terus kepada plaintif. Terkilan, defendan memfailkan rayuan ini terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan:

(1) Jelas sekali ini bukanlah kes pencerobohan yang jelas dan bahawa defendan telah menunjukkan bahawa terdapat isu undang-undang dan fakta yang boleh dibicarakan. Konflik dalam keterangan afidavit hanya boleh diselesaikan pada perbicaraan yang dimulakan dengan tindakan writ dan bukan melalui prosedur terus di bawah A 89 KKM 2012. Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam undang-undang dan fakta apabila membuat kesimpulan bahawa tiada isu yang layak untuk dibicarakan dan bahawa prosedur terus di bawah A 89 KKM 2012 telah digunakan dengan betul untuk tujuan perintah pengusiran oleh plaintif sebagai pemajak berdaftar terhadap defendan, yang didapati oleh hakim yang bijaksana, menduduki tanah secara haram. Memandangkan A 89 KKM 2012 adalah prosedur terus khas untuk mendapatkan perintah pengusiran, apabila didapati bahawa prosedur terus itu tidak sesuai, perintah yang sewajarnya adalah bukan untuk menukar OS kepada writ tetapi menolaknya dengan kebebasan kepada plaintif untuk memfailkan tindakan writ (lihat perenggan 35–37).

(2) Sama ada ini adalah kes yang memerlukan pampasan dalam soal hak pemilik berdaftar dan pemajak vis a vis komuniti orang asli yang menduduki tanah itu akan menjadi satu perkara yang perlu diselesaikan dengan cara tindakan writ di mana pihak yang sepatutnya berada di hadapan mahkamah. Terdapat isu serius yang perlu dibicarakan seperti yang didedahkan dalam afidavit dan hanya boleh diselesaikan sepenuhnya dan akhirnya dalam tindakan melalui writ dan bukan melalui prosedur terus di bawah A 89 KKM 2012 (lihat perenggan 59 & 70).

(3) Sama ada atau tidak: (a) negeri mempunyai pengetahuan atau sumber pengetahuan bahawa sebahagian daripada orang asli Suku Semelai telah menetap di kawasan yang tidak *diwartakan*; dan (b) ini adalah kes yang termasuk dalam keadaan yang mencacatkan hak milik yang diperoleh secara tidak sah oleh pemilik berdaftar semasa, akan menjadi perkara yang perlu diputuskan semasa perbicaraan. Ia akan menjadi penyalahgunaan proses mahkamah untuk menggunakan prosedur terus A 89 KKM 2012 untuk kononnya perkara di mana orang asli yang tinggal di atas tanah itu boleh dilucutkan secara kekal daripada tanah mereka tanpa sebarang pampasan sama sekali (lihat perenggan 83, 90 & 92).]

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Bohari Talib & Ors v Pengarah Tanah & Galian Selangor [1991] 1 CLJ Rep 48, SC (folld)

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2022] 2 MLJ 273; [2022] 3 CLJ 1, FC (refd)

Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89; [1994] 1 CLJ 313, SC (refd)

Farek bin Urep & Ors v Ehsan Bina Sdn Bhd & Anor [2017] 1 MLJ 413; [2017] 3 CLJ 420, CA (refd)

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158, CA (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289, CA (folld)

Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor v Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal [2015] 6 MLJ 527, CA (refd)

Lee Toon Hian v Kok Siew Tong & Ors [2019] MLJU 81; [2019] 1 LNS 64, HC (refd)

Lee Wee Choong (trading under the name & style ofWCE Electrical Services) & Anor v Teh Ching Yan & Anor [2018] MLJU 1838; [2018] 1 LNS 1997, CA (refd)

Salim bin Ismail & lain-lain lwn Lebbey Sdn Bhd (No 2) [1997] 2 MLJ 4, CA (refd)

Sidek bin Haji Mohamad & 461 Ors v Government of the State of Perak & Ors [1982] 1 MLJ 313, FC (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)

Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang & Tham Sow Seng & Ors [2001] 1 MLJ 585; [2001] 4 CLJ 97, HC (refd)

Tradewinds Corridor Sdn Bhd lwn Azmi Awang Kecik & Yang Lain [2015] 1 LNS 486, HC (refd)

Yebet bt Saman & Ors (sued on behalf of himself and 76 other people of Semaq Beri

as listed in Appendix A) v Foong Kwai Long & Ors [2015] 2 MLJ 498, CA (refd)

Legislation referred to

Aboriginal Peoples Act 1954 ss 6, 7, 8, 9, 6(2)(iii), 7(2)(iv)
Federal Constitution arts 5(1), 8(5), 13, 13(2), Part II, Sixth Schedule
Land Acquisition Act 1960
National Land Code ss 4, 5, 22, 340, 340(3)
Rules of Court 2012 O 14A, O 15 rr 3(1), 5(2), O 28 r 8(1), O 89, O 89 r 1
Rules of the High Court 1980 O 89

Appeal from: *Elite Agriculture Sdn Bhd lwn Hajemi bin Din dan satu lagi* [2022] 8 MLJ 778 (High Court, Temerloh)

Selva Balan Sinnan (with Elaine Gan) (Azman Joseph & Assoc) for the appellant.
Abu Bakr Mohamed Saifudin (Ram Reza & Muhammad) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The main question for decision in this appeal is whether a person who is a registered lessee of a piece of land may proceed to obtain a vacant possession order under the summary procedure in O 89 of the Rules of Court 2012 ('the ROC 2012') against the occupiers of the land who claimed to be aborigines of the Semelai tribe and who asserted that they have been occupying the land for six generations and thus have customary rights over the land.

[2] Related to that issue is whether the principle of indefeasibility of title is nevertheless subject to claims of customary rights or tenure over the land.

[3] The plaintiff in the High Court below is the registered lessee for 99 years of a lease over the land held under HS(D) 9781 No PT 9492, Mukim Bera, Pahang ('the land') which it had obtained from the registered proprietor of the freehold title to the land, one Sri Jengka Sdn Bhd. The land is about 903 acres.

[4] The registered proprietor had obtained the title to the land after a successful application via its letter dated 12 March 2013 to the Pejabat Daerah dan Tanah Bera. The registered proprietor had in turn leased it to the plaintiff for the purpose of clearing the land for oil palm cultivation.

[5] It was not disputed that around June and July 2013 the plaintiff's representative tried to enter the land but was prevented by the defendants. The first defendant is the headman of the community and the second defendant had been named as occupiers on the land. The plaintiff alleged that the defendants had refused to deliver vacant possession of the land to the plaintiff.

AT THE HIGH COURT

[6] The defendants in their affidavit to oppose the summary procedure invoked by the plaintiff under O 89 of the ROC 2012 had averred that the land is part of the customary land of the Semelai people and some transcript of a phone conversation between the then Chief Minister of Pahang, Dato' Sri Diraja Hj Adnan bin Hj Yaakob with the first defendant was produced where an acknowledgment was made that a huge part of the land is customary land.

[7] The High Court held that the National Land Code ('the NLC') provides for registered interest and title to land which would be indefeasible against the whole world unless there are vitiating circumstances proved like fraud, forgery, void and insufficient instrument or that the alienation or transfer was invalid or unlawful.

[8] The High Court then went on to observe at para [8] of its judgment that the law with respect to squatters or illegal occupiers is clear in that they do not have any right to occupy the land and the cases of *Sidek bin Haji Mohamad & 461 Ors v Government of the State of Perak & Ors* [1982] 1 MLJ 313 and *Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang & Tham Sow Seng & Ors* [2001] 1 MLJ 585; [2001] 4 CLJ 97 were cited as authority for the said proposition of law. A passage was also quoted from the case of *Tradewinds Corridor Sdn Bhd lwn Azmi Awang Kecik & Yang Lain* [2015] 1 LNS 486 to the effect that the plaintiff who is the registered lessee has his interest protected under s 340(3) of the NLC and that trumps the rights and interests of the defendant whose interest was not registered against the title.

[9] The learned High Court judge was of the view that the defendants merely asserted that the land is customary land without any documentary evidence substantiating that assertion. He further noted that there was no location plan of the land to show specifically the size of the land claimed to be customary land and as such is a bare allegation. There was also no letter from the state authority to confirm that the land is part of customary land.

[10] The learned High Court judge also observed that the defendants did not provide any evidence that they are the aborigines of the Semelai tribe and that the first defendant have been appointed by the Jabatan Kamajuan Orang Asli Malaysia ('JAKOA') as the Tok Batin (village head). He also noted that the transcript of the conversation with the previous Chief Minister of Pahang was on 6 August 2015 and until the date of filing of the originating summons ('OS') in October 2020, which is some five years later, the state authority/state government had not returned the alleged customary land to the native people.

[11] The learned High Court judge was of the view that up to the stage of the filing of the OS, it is clear that the plaintiff is the registered lessee of the land and quoted the dicta of the court in *Lee Toon Hian v Kok Siew Tong & Ors* [2019] MLJU 81; [2019] 1 LNS 64 as support for the fact that these occupiers are trespassers or squatters as follows:

> ... nor the Perak State Authority had ever given any licence, consent or permission to the defendants to occupy the said land. It is therefore this court's finding that the defendants are trespassers or squatters on the plaintiff's land.

[12] The High Court was of the view that the defendants having occupied the land without any license or consent of the state authority/state government, the said occupation was a trespass on the land in violation of the plaintiff's indefeasible lease interest in the land under s 340 of the NLC.

[13] The learned High Court judge then confidently concluded that there was no triable issues that the defendants had raised which merit a trial and so a vacant possession order was granted summarily on 16 February 2021 to the plaintiff under O 89 r 1 of the ROC 2012 together with costs of RM10,000 subject to allocator.

BEFORE THE COURT OF APPEAL

[14] The defendants, being aggrieved by the decision of the High Court, had appealed to this court principally on the following grounds:

(a) that the summary procedure under O 89 of the ROC 2012 is not meant for cases where the occupiers have been in occupation of the land even before the title is issued to the registered proprietor;

(b) the NLC recognises the right of the aboriginal people to occupy land held under customary rights or tenure and all registered interest and title are subject to such rights, if proved; and

(c) that where there is a dispute on whether the land is subject to customary rights or tenure as asserted by the defendants as in this case, the action cannot be by way of an OS under the summary procedure and instead a writ action has to be commenced.

[15] The parties shall be referred to as they were in the High Court as plaintiff and defendants.

Whether the defendants have discharged their burden of proof that they have an arguable case that they are not trespassers ab initio such that the summary procedure under O 89 of the ROC 2012 shall not be invoked

[16] Order 89 r 1 of the ROC 2012 is clear in its purport in that it is only suitable to be invoked in cases of trespassers ab initio and not in a case where the occupiers have been in possession of the land either with the agreement, license or consent of the previous owner of the land. Here there was no previous registered owner of the land but that when title was issued to the first registered proprietor in 2013, the registered proprietor had subsequently allowed the plaintiff to enter the land for the purpose of clearing it for oil palm cultivation vide a letter dated 14 June 2013. When in June and July 2013 the plaintiff tried to enter upon the land, they were prevented by the defendants from doing so and so the plaintiff lodged a police report.

[17] The registered proprietor subsequently leased the land to the plaintiff whose lease interest was duly registered against the title on 2 March 2015. It was a leasehold interest of 99 years from 25 September 2014 to 24 September 2013 as reflected in the title.

[18] The plaintiff's subsequent attempts to enter the land was also met with opposition and according to the plaintiff, its people were chased away and threatened by the defendants. The plaintiff averred that the defendants had barricaded up the entry to the land. Further attempts to enter the land were made but each time it was met with opposition from the defendants and further police reports were lodged by the plaintiff.

[19] The plaintiff verily believed that the defendants are trespassers bent on denying the plaintiff its legal rights as registered lessee of the land. The plaintiff further averred that the land had been trespassed upon by the defendants and that they have usurped the plaintiff's right to the land. The plaintiff believed that the land had been exploited by the defendants for profit and that the defendants do not stay there.

[20] The plaintiff further averred that the defendants are not the aboriginal people (Orang Asli) and that they do not forage for food or hunt in the land. According to the plaintiff, these occupiers have instead conspired to 'sell' the land to other businessmen for them to plant their oil palm trees on the land and that they are in cahoots with unknown 'buyer' of the land.

[21] The defendants on the other hand, through an affidavit affirmed by the first defendant averred as follows:

(a) he is the Tok Batin or Village Head of the Orang Asli in Kampung Orang Asli Lubuk Perah and that the defendants occupiers in the OS are the original people of the Semelai tribe from the Proto Malay in Peninsular Malaysia;

(b) he said that the defendants and their forebears were born and bred, grew up and lived as an Orang Asli in the land of about 5472 acres in Kampung Lubuk Perah, Bera Selatan Satu, Pahang Darul Makmur and its surrounding areas (customary land) for six generations which is more than 100 years;

(c) he averred that they have a common law right on their customary land to move freely on the land and to forage for food without any interference from third parties;

(d) he had been appointed by the JAKOA as the Tok Batin and there has been acknowledgment of their occupation of the land by the regular visits of officials from the Ministry of Health and by the JAKOA;

(e) he said that the defendants have communal customary rights over the land which had been recognised by the State Government, the State Director of Land and Mines and by Sri Jengka Sdn Bhd before the title was issued;

(f) he referred to a tele-conversation on 6 August 2015 with the then Chief Minister that only 200 acres of the customary title to the land would be used by Sri Jengka Sdn Bhd and the rest would be officially recognised as communal customary land and a copy of the transcript of the tele-conversation was produced;

(g) he also averred that the plaintiff should have joined the State Director of Land and Mines and the state government as parties so that the issues that have arisen can be resolved fully and finally; and

(h) he also alleged that there had been a wrongful issuance of the title to Sri Jengka Sdn Bhd as the land is held under customary title and that the plaintiff had trespassed onto their land.

[22] In *Salim bin Ismail & lain-lain lwn Lebbey Sdn Bhd (No 2)* [1997] 2 MLJ 4 at p 6 it was held that:

> The summary procedure under O 89 is governed by the same principle as those under O 14 of the Rules of the High Court 1980. *To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact.* It is only in clear cases of trespass that a summary order can be made under O 89. (Emphasis added.)

[23] The plaintiff had denied that the defendants belong to the *Semelai tribe of Orang Asli* recognised under the Aboriginal Peoples Act 1954 ('the 1954 Act') and that they have 'community title by custom' by operation of common law over the land. In the light of the denial, this issue as to the defendants' tribal identity would have to be proved in a trial and cannot be resolved by affidavit evidence alone. If the defendants are of the Semelai tribe, then the Court of Appeal in *Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor v*

Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal [2015] 6 MLJ 527, in the judgment of Justice Vernon Ong JCA (now FCJ), had agreed with the High Court finding of fact that the Semelai people are an identifiable native aborigine group who have existed in the Bera region for a very considerable period of time as follows:

> [45] According to renowned Malaysian historian Hj Buyong Adil in his *Sejarah Pahang* published by Dewan Bahasa dan Pustaka in 1984, the ancestors of today's Orang Asli groups lived in Pahang since the Middle Stone Age period. According to the expert report of Dr Collin G Nicholas, the presence and occupation of the Semelai people in the Bera Drainage Area, ranging from the mouth of the Bera River at Kuala Bera, along the whole stretch of the Bera River and into Tasek Bera is acknowledged in documentary materials from various sources. There were also several earliest available maps in the area which show or indicate the presence and occupation of the Semelai people in the Bera Drainage Area.

[24] Even before the filing of the OS by the plaintiff on 8 October 2020, the solicitors for the defendants had written to Sri Jengka Sdn Bhd on 31 July 2015 to inform them that the defendants are of the Semelai tribe and that they have been in occupation of the land for at least six generations and that the continued occupation of the land gives the defendants a community title by custom and further that the defendants have acquired rights over the land.

[25] There was another letter sent by the solicitors for the defendants dated 9 March 2016 to the plaintiff reiterating the contents of the previous letter of 31 July 2015 that was issued to the registered proprietor of the land.

[26] The plaintiff by a letter dated 18 March 2016 quickly denied the contents of the letter of the defendants' solicitors of 9 March 2016. In the light of the assertions and denials, there is no way in which this dispute over identity and prior occupation can be resolved other than through a trial begun by a writ action and not a summary procedure via an OS.

[27] The conflict in affidavit evidence is not on the face of it implausible and it leaves serious questions to be tried and clearly such a conflict is not suitable for disposal on affidavit evidence.

[28] Order 28 r 8(1) of the ROC 2012 itself provides that:

> (1) Where, in the case of a cause or matter begun by originating summons, *it appears to the Court at any stage of the proceedings* that the proceedings should for any reasons be continued as if the cause or matter had been begun by writ, *it may order the proceedings to continue as if the cause or matter had been begun by writ* ... (Emphasis added.)

A **[29]** Whilst that is a discretion that the court may exercise, it is neither neat nor elegant to convert the two affidavits filed by the plaintiff and the affidavit in opposition filed by the defendants into pleadings and to give consequential directions for case management. Moreover, this is a case where the plaintiff may want to bring in the State Director of Land and Mines and the state
B government for having issued the title without due compensation being paid to the defendants if indeed it is true that the defendants had been in occupation of the land for some six generations before the land was alienated to the registered proprietor.

C

[30] Even if the plaintiff is not so minded to join the State Director of Land and Mines and the state government, the defendants may want to do so if they can show that they had been wrongfully deprived of their land by the State Director of Land and Mines and the state issuing a title in the name of the
D registered proprietor who then leased it to the plaintiff, all without any compensation to the defendants.

[31] Order 15 r 3(1) of the ROC 2012 provides that where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other
E person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject matter of the action, then, subject to r 5(2), he may join that other person as a party against whom the counterclaim is made.

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[32] If indeed the defendants have customary rights over the land, then it would appear that the title to the land had been wrongly and unlawfully issued to the registered proprietor and surely the defendants are entitled to prosecute
G their claim for being unlawfully deprived of the land without proper compensation from the state.

[33] Such a counterclaim by the defendant is not possible in an OS action and indeed not appropriate in any event as there would be disputes on law and
H facts that would have to be thrashed out in a writ action where the proper discovery application may be made against the parties and where witnesses are called and cross-examined.

[34] In the light of the conflict in affidavit evidence, the summary procedure
I for evicting occupiers of the land cannot be invoked. The following are matters, by no means exhaustive, that can only be resolved at a trial begun by a writ action where discovery applications may be made and witnesses called and cross-examined:

(a) evidence on whether the defendants are Semelai and how long the defendants and their forebears have been on their land with respect to recognition by the authorities including the appointment of Tok Batin in the past and present and tomb stones as well as places of cultural, spiritual and religious significance and the like;

(b) whether the defendants enjoy customary rights or tenure over the land and have customary community title to the land;

(c) whether the land is an aboriginal area or an aboriginal inhabited place in that they have been staying in and tending to and harvesting their orchards and harvesting the forest produce or foraging for food and hunting there without any break in continuity for some six generations;

(d) whether archival and expert evidence is available on the socio-economic aspects of the Orang Asli community of the Semelai and whether there are cultural distinctives of the Semelai on the land;

(e) whether there are aerial photographs that could shed some light on the activities on the land in the past years before the title was issued; and

(f) whether the exercise of issuing the title to the land was properly undertaken vis a vis the presence or absence of the defendants on the land and surveys that may have been taken.

[35] Evidently this is not a clear case of trespass and that the defendants have shown that there are triable issues of law and fact.

[36] We are of the opinion that the conflict in affidavit evidence can only be resolved at the trial begun by a writ action and not via a summary procedure under O 89 of the ROC 2012. With respect, the learned High Court judge erred in law and in fact when he concluded that there were no issues worthy of a trial and that the summary procedure under O 89 of the ROC 2012 was rightly engaged for the purpose of an eviction order by the plaintiff as a registered lessee against the defendants, whom the learned judge found, are in illegal occupation of the land.

[37] As O 89 of the ROC 2012 is a special summary procedure for obtaining an eviction order, once it is found that the summary procedure is inappropriate as we do so find here, the proper order is not to convert the OS into a writ, unless some hardship would befall the plaintiff in a case for example, where limitation has set in, but to dismiss it with liberty to the plaintiff to file a writ action.

[38] It would be an anomaly to have a writ action with an intitulement referring to O 89 of the ROC 2012 when such a procedure is by way of an originating summons. A writ under O 89 of the ROC 2012 would be a strange

creature indeed — a bundle of contradictions!

[39] It is instructive to refer to the Supreme Court case of *Bohari Talib & Ors v Pengarah Tanah & Galian Selangor* [1991] 1 CLJ Rep 48 where the respondent claimed under O 89 of the Rules of the High Court 1980 ('RHC 1980') for the recovery of possession of some lands. The provisions of O 89 in both the ROC 2012 and the RHC 1980 are identical. The subject lands had been occupied by the appellants and their forefathers and that between 1971 and 1976, the appellants alleged that they had applied to the state authority for titles to the said lands. On 4 September 1980 the Selangor State Executive Council approved the alienation of the lands to the appellants. For the first three years, temporary occupation licences ('TOL') were issued after which separate titles were to be issued.

[40] After the expiry of the TOL period in 1984, the appellants argued that they had acquired a legal right or expectation to be issued with land titles. However, the respondent then thought it fit to hand the lands over to the Federal Land Consolidation and Rehabilitation Authority ('FELCRA'), a statutory body whose main function was to rehabilitate abandoned agricultural land. The respondent sued the appellants to recover possession of the lands under the summary procedure under O 89 of the then ROC 1980.

[41] The Supreme Court opined at p 52 as follows:

> In our view, the appellants in this particular case have *sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the State Government* by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that TOLs and therefore consent were given only up to 1983. After that no TOL was issued to indicate absence of consent. In our view, the alleged continued consent of the State Government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of the TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s 42 of the National Land Code, and pending issue of titles under s 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p 95 of appeal record reads:
>
> > Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.
>
> We are therefore of the opinion that *there are issues to be tried in this case which are not*

suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O 89. Counsel for the appellants has rightly referred to the position of licensees holding over as distinct from squatters in the following judgment of Lawton J in *McPhail v Persons Names Unknown* [1973] 3 AllER 393 at p 401:

> It follows, in my judgment, that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the Court to stay execution in such cases. (Emphasis added.)

[42] The Supreme Court therefore allowed the appeal with costs and set aside the order of the High Court with liberty to the respondent to proceed afresh with the claim for possession by writ.

[43] In *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, the respondent was the successful bidder of the properties at a public auction conducted under the NLC and he had terminated the monthly tenancies by separate notices to quit on all the four appellants, and demanded delivery of vacant possession. When the appellants failed to comply with the said notices, the plaintiff filed an application by originating summons for vacant possession, which was granted by the High Court. On appeal, the Supreme Court allowed the appeal and set aside the order of the High Court and observed at p 94 (MLJ); 316 (CLJ) that:

> It should be noted that O 89 has its origin in O 113 of the English Rules, and the principle behind *McPhail v Persons, Names Unknown* [1973] 3 All ER 393 is clearly to limit the operation of the summary procedure of 1989 to trespassers pure and simple, whether known or unknown. In our view, *the summary procedure should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be triable issues on the facts and the law for determination by evidence viva voce.* In this connection we approve the judgment of Wan Adnan J in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 as discussed by Edgar Joseph Jr J (as he then was) at p 224, and upheld by the Supreme Court in [1991] 1 MLJ 404. (Emphasis added.)

[44] The question, at the first level at least, is not whether the plaintiff as a registered lessee is entitled to vacant possession of the land but whether the summary procedure under O 89 of the ROC 2012 is available based on the given facts. In *Farek bin Urep & Ors v Ehsan Bina Sdn Bhd & Anor* [2017] 1 MLJ 413; [2017] 3 CLJ 420 the Court of Appeal observed as follows:

> [9] It is our view that the appellants had demonstrated *an arguable case that they could occupy the said lands with the acquiescence of the predecessors in title of the respondents and raised several triable issues which were not apt to be dealt with under* O 89 of the Rules of Court 2012. We therefore allowed the appeal with costs of RM5,000 and deposit to be refunded to the appellant. (Emphasis added.)

[45] We would similarly say that the defendants had demonstrated an arguable case that they could occupy the land where they and their forebears had been living in and whether or not they have a customary community title to the land or have any customary right or tenure over the land is not apt nor appropriate to be decided summarily.

[46] In yet another case decided by the Court of Appeal in *Lee Wee Choong (trading under the name & style of WCE Electrical Services) & Anor v Teh Ching Yan & Anor* [2018] MLJU 1838; [2018] 1 LNS 1997, it was observed that:

> ... there are real issues or questions that require trial and that the present summary procedure under O 89 is grossly unsuitable on the present facts. As with other summary procedures, the orders sought can only be properly granted where it is plain and obvious that there are no triable issues. That is not the case here.

[47] We would say quite confidently that based on the facts as they present themselves here, the eviction order sought can only be properly granted where it is plain and obvious that there are no triable issues. The fact that there are multiple issues of fact and law would become more obvious as we explore further the ramifications of the assertions of the parties in the light of the relevant statutes in the 1954 Act, the Land Acquisition Act 1960 and the NLC vis a vis the issue of customary rights or tenure to the land.

Whether the state may issue a title to allow a person to be a registered proprietor over land occupied by a community of aborigines without prior compensation

[48] If it is indeed true that the defendants are aboriginal people of the Semelai tribe and that they have been in continuous occupation of the land to which a title has now been issued to the registered proprietor who had in turn leased it to the plaintiff under a registered leased under the NLC, where then do the defendants stand?

[49] In a matter where everyone affected is before the court, the rights and liabilities of the various parties may be resolved fully and finally. The plaintiff may have to bring in not just the Director of Lands and Mines but also the state government as well as the registered proprietor from whom the plaintiff had obtained a registered lease of 99 years.

[50] Even if the plaintiff is not minded to, it behoves the defendants to so bring these parties as defendants in a cross action or counterclaim as referred to earlier, on an abundance of caution.

[51] The present state of our law with respect to aboriginal land or land inhabited by the aborigines under the 1954 Act is that they cannot be deprived of the land without proper compensation. The Court of Appeal in *Yebet bt*

Saman & Ors (sued on behalf of himself and 76 other people of Semaq Beri as listed in Appendix A) v Foong Kwai Long & Ors [2015] 2 MLJ 498 had reaffirmed the above proposition of law first propounded by the Court of Appeal case of *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158.

[52] In *Adong bin Kuwau*'s case the Court of Appeal had placed the rights of the aboriginal peoples under common law to live on (as in settlement) and off (as in harvesting forest produce and foraging for food) the land (whether it be aboriginal land or land inhabited by them) to be complementary to their rights under the 1954 Act. The Court of Appeal at pp 162–163 quoted the High Court's judgment reported in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 at p 430:

> My view is that, and I get support from the decision of *Calder*'s case (*Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145) and *Mabo*'s case (*Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1), the aboriginal peoples rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in *Calder*'s case at p 156 where His Lordship said the rights and which rights include the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished. I would agree with this ratio and rule that in Malaysia the aborigines common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

[53] Again the Court of Appeal at p 163 quoting the High Court's judgment at pp 430–431:

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s 11 of the Act, guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look

for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

The Act does not limit the aborigines rights therein. In order to determine the extent of aboriginal peoples full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

[54] In *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 the Court of Appeal took the issue of compensation a notch further and declared that the aborigines of West Malaysia are entitled to compensation under the Land Acquisition Act 1960 if they have been deprived of their land. The Court of Appeal observed as follows:

[44] Now, it is all very well to say that the first [Selangor State Government] and/or fourth defendants [Government of Malaysia] must pay adequate compensation. But how does the court work out adequate compensation? As I said, the judge thought that it should be done on the basis of the 1960 Act. He was entirely correct of course because the 1960 Act by definition applies to the plaintiff's case. For s 2 of the 1960 Act defines land as follows:

land 'means alienated land within the meaning of the State land law, *land occupied under customary right* and land occupied in expectation of title; (Emphasis added.)

[45] There it is then. *The plaintiffs were occupying their land under customary right recognised by the 1954 Act. So when they were compulsorily deprived of their land, they were entitled to payment of compensation in accordance with the principles laid down by our courts in cases decided under the 1960 Act.*

[46] The learned judge when dealing with this aspect of the case said:

The expression 'land occupied under customary right 'is not defined. Hence, in construing its meaning, I adopt a purposive approach and hold that it should be given a wider interpretation so as to achieve the object of the LAA (the 1960 Act), that is to say, to ensure adequate compensation be paid for the land acquired.

[47] I find no misdirection on this point by the learned judge. Indeed, as may be seen, his approach accords entirely with the view I have taken of the matter. The learned judge by adopting a liberal interpretation was merely giving full effect to art 8(5)(c) of the Federal Constitution which sanctions positive discrimination in favour of the aborigines ... (Emphasis added.)

[55] As stated, to be deprived of the land, in either a case where the state acquires it or the state alienates it to someone else, would be unlawful without proper compensation for that would be to deprive the aborigines of their livelihood under art 5(1) read with art 13 of The Federal Constitution.

[56] Article 5(1) reads:

> 5 Liberty of the person
>
> No person shall be deprived of his life or personal liberty save in accordance with law.

[57] Article 13 states:

> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[58] The Court of Appeal in *Adong bin Kuwau* in a language heralding hope in an expansive and liberating interpretation of the fundamental liberties enshrined in Part II of the Federal Constitution, declared as follows at p 164:

> ... It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

[59] Whether or not this is a case which requires compensation in the matter of the rights of a registered proprietor and lessee vis a via a community of aboriginal people occupying the land would be a matter that has to be resolved by way of a writ action where the proper parties are before the court.

[60] To bring a summary procedure action under O 89 of the ROC 2012 would be to oversimplify the issues and to shut one's eyes to what is now revealed, a possible interests and rights of the aboriginal peoples living on the land. The court just cannot turn a blind eye to what appears to be a possible deprivation of the rights of the poor and marginalised in the aboriginal people which receive special protection both under the 1954 Act and more so under the Fundamental Liberties provision of the Federal Constitution that judges, in their oath of office, have pledged to 'To preserve, protect and defend its Constitution'. See the Sixth Schedule to the Federal Constitution.

[61] The learned senior federal counsel ('SFC') on behalf of the state government had tried to prevail upon the Court of Appeal in *Yebet bt Saman* to

revisit the above proposition of law in *Adong bin Kuwau*, but to no avail. The Court of Appeal very sagaciously declined to deviate from the previous decision that declared that the common law rights of the aboriginal people can co-exist with the statutory rights under the 1954 Act and that indeed, the 1954 Act does not abolish nor abrogate the common law rights of the aboriginal people. The Court of Appeal said:

> [8] We subscribe to the views expressed by His Lordship in the Court of Appeal in *Adung*'s case. We observe also that the said Act does not anywhere provide that the said Act has been passed to exclusively deal with the issue of aboriginal peoples rights. By way of analogy, the National Land Code provides an exclusive machinery for registration of title in Peninsular Malaysia and we quote:
>
> > An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur and for purposes connected therewith.
>
> [9] It follows that common law rights of the plaintiffs can co-exist with the said Act. We also considered the following cases in support of that proposition ie *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677.
>
> [10] The SFC acting for the fourth and the sixth defendants invited this court to revisit this area of the law and argued quite forcibly that common law has no place in addressing the plaintiffs claims, as they would be governed by the said Act. However, we are unable to agree, in view of the present state of authorities on the point. We are bound by the decisions of the Federal Court and would adopt the principles enunciated in those cases. Further decisions from common law jurisdictions are instructive. In this regard we are reminded of the words of Raja Azlan Shah J (as His Royal Highness then was) in the case of *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151, where he said and we quote:
>
> > Although the decisions of the Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in the Australian and English cases so that the common law and its development should be homogenous in the various sections of the Commonwealth.

[62] The Court of Appeal further held in para [11] that the plaintiffs who are Semaq Beri which is a subgroup of the Senoi category of the aboriginal people under the Act were entitled to seek a declaration of rights to occupy and use of the land there in common law. The defendants here may want to learn from the previous experience of their brethren in *Yebet bt Saman*'s case and pray for a similar declaration by way of a counterclaim as and when the plaintiff should file a fresh writ action or even to bring such an action as the plaintiff now that they are aware that there has been a title issued over their land duly registered

in the proprietor's name with a lease registered in favour of the plaintiff here.

[63] In the earlier Court of Appeal case of *Adong bin Kuwau* the plaintiffs there, being the aboriginal people, had claimed against the Government of the State of Johor and the Director of Land and Mines, Johor seeking declarations that the lands acquired by the defendants for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve; and that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of Singapore or a sum deemed just by the court. The defendants had alienated 53,273 acres from their 'kawasan saka' to the state corporation by way of four titles.

[64] Whilst the alienation of the land to the state corporation or the acquisition of the land by the state governmen through its state corporation was ostensibly for a public purpose in that the state corporation had subsequently entered into an agreement with the Government of the Republic of Singapore to build a dam and supply water to both Singapore and the State of Johor, it does not bypass the need to pay adequate compensation to the plaintiffs.

[65] As far back as 2005, the Court of Appeal in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 held that the aboriginal people enjoy a community title by custom over their land as follows:

> [33] *The fact that the plaintiffs enjoy a community title by custom is nothing out of the ordinary.* The Privy Council in *Amodu Tijani* recognised the existence of such title in other jurisdictions. That concept has been reaffirmed by the Constitutional Court of South Africa in *Alexkor Ltd v Richtersveld Community* (2003) 12 BCLR 130.
>
> ...
>
> [34] The evidence led in the court below and the findings of fact made by the learned judge which are unchallenged before us leave no room for doubt that *the plaintiffs had ownership of the lands in question under a customary community title of a permanent nature.* Therefore, it is my considered judgment that the learned judge did not fall into any error when he held that the plaintiffs had customary community title to the land in question. (Emphasis added.)

[66] We agree with learned counsel for the defendants that whether the defendants can successfully claim title by custom is a question of fact to be proved in a trial action begun by writ as there are serious disputes on the relevant facts here. In *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* it was observed that:

> [12] First, that the fact that the radical title to land is vested in the Sovereign or the State (as is the case here) is not an ipse dixit answer to a claim of customary title. *There can be cases where the radical title is burdened by a native or customary title. The precise nature of such a customary title depends on the practices and usages of each*

individual community. And this brings me to the second important point. It is this. *What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as it was decided in this case) by the primary trier of fact* based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies. (Emphasis added.)

[67] Even if the land is not *gazetted* as an aboriginal reserved land but merely an aboriginal area, based on the Court of Appeal authority in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors*, the state governmen would have a fiduciary duty to safeguard the interests of the aborigines staying there and to grant compensation if their land, though not *gazetted* as an aboriginal reserve land, had been acquired or otherwise been taken away from them and alienated to another. This is what the Court of Appeal said in clear and crisp language that leaves no room for confusion or contradiction:

> [58] I have given this part of the case anxious consideration and have arrived at the conclusion that the learned judge erred in not holding against the first defendant in respect of the *ungazetted* portion of the land. In my judgment after having correctly held:
>
> (a) that the plaintiffs 'customary communal title attached itself to the first defendant's radical title; and
>
> (b) that the first and fourth defendants were under a fiduciary duty 'to protect the welfare of the aborigines including their land rights',
>
> the trial judge ought to have included the *ungazetted* area in question for purposes of compensating those settled there for the deprivation of their property rights.
>
> [59] In my judgment, it was open to the judge to have made a finding that the failure or neglect of the first defendant to *gazette* the area in question also amounted to a breach of fiduciary duty. Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the *ungazetted* area. It was aware that so long as that area remained *ungazetted*, the plaintiffs 'rights in the land were in serious jeopardy. It was aware of the 'protect and promote 'policy that it and the fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these plaintiffs turn to? In that state of affairs, *by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place. I am yet to see a clearer case of a party taking advantage of its own wrong.* For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area which is more clearly demarcated in the plan exh. P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as the

gazetted portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross appeal must therefore be allowed. (Emphasis added.)

[68] By no means are we making a decision on the status of the land which can only be determined at the trial with respect to whether it is land occupied under customary right. We are saying that there is more than meets the eye and not as simple and straightforward as the plaintiff had painted it with the colours and certainty of indefeasibility from the perspective of a registered proprietorship and lessee of the land.

[69] The court is duty bound to look out for the interest of the weaker and marginalised members of our community, who because of their vulnerability coupled with their small numbers and thus lacking electoral significance, would need a special legislation in the 1954 Act to protect and promote their interests with art 8(5) of the Constitution to sanction positive discrimination in their favour.

[70] The more we scrutinise the issues that present themselves in this case, the more we are convinced that there are serious issues to be tried as disclosed in the affidavits and which can only be fully and finally disposed of in an action by writ and not via a summary procedure under O 89 of the ROC 2012 as the plaintiff had attempted to and which this court, respectfully, would not allow.

Whether the principle of indefeasibility of title or interest may be defeated by a claim to community title under customary right over the land under the Aboriginal Peoples Act 1954 or under common law

[71] The relevant provisions of the 1954 Act must be read harmoniously with s 4 of the NLC and the Court of Appeal in *Sagong Tasi*'s case had clarified and confirmed that:

> ... I would add for good measure there is also nothing in the Code, which is the principal statute that regulates titles and dealings in land and interests in land which strikes at the recognition a of lands held under customary title. *Indeed, s 4 of the Code expressly says that it does not apply to lands held under customary title.* (Emphasis added.)

[72] More than that s 4 of the NLC further states as follows:

> 4 *Savings*
>
> (1) Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act:

A Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act.

(2) Except in so far as it is expressly provided to the contrary, *nothing in this Act shall affect the provisions of —*

B (b) *any law for the time being in force relating to customary tenure;*

...

and, in the absence of express provision to the contrary, *if any provision of this Act is inconsistent with any provision of any such law, the latter provision shall prevail,* and the C former provision shall, to the extent of the inconsistency, be void. (Emphasis added.)

[73] In other words, unless there is a carved out exception, any provisions of the NLC and that would include s 340 on indefeasibility, which is inconsistent D with the relevant provisions of the 1954 Act as highlighted below, may be void to the extent of its inconsistency. It is a case of the 1954 Act trumping and triumphing over the NLC where the latter provisions is inconsistent with the former.

E

[74] Granted there is nothing preventing the State from acquiring any land, be it private land or even an aboriginal area or reserve or land that should have been *gazetted* as such under the state's fiduciary duty to protect the rights and interest of the aborigines who are the First Peoples of the Country, such F compulsory acquisition must be for a public purpose and with adequate compensation as stated in the Land Acquisition Act 1960 and art 13(2) of the Federal Constitution where adequate compensation must be paid.

[75] After all the definition of 'land' under the Land Acquisition Act 1960 G reads:

'land' means alienated land within the meaning of the State land law, *land occupied under customary right* and land occupied in expectation of title; (Emphasis added.)

H **[76]** The relevant provisions of the 1954 Act are ss 6, 7, 8 and 9. Section 6 deals with 'aboriginal areas' which are lands occupied by the aborigines but not yet declared as an aboriginal reserve under s 7. It reads as follows:

(1) The State Authority may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared I an aboriginal reserve under section 7, to be an *aboriginal area* and may declare the area to be divided into one or more aboriginal cantons:

Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.

(2) Within an aboriginal area:

(i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;

(ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

(iii) *no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines* normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General; and

(iv) no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under subsection (1). (Emphasis added.)

[77] Section 7 deals with 'aboriginal reserve' which may be *gazetted* as such:

7(1) The State Authority may, by notification in the Gazette, declare any area exclusively inhabited by aborigines to be an *aboriginal reserve:*

Provided:

(i) when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and

(ii) an aboriginal reserve may be constituted within an aboriginal area.

(2) Within an aboriginal reserve:

(i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;

(ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

(iii) no land shall be declared a reserved forest under any written law relating to forests;

(iv) *no land shall be alienated, granted, leased or otherwise disposed of except to aborigines* of the aboriginal communities normally resident within the reserve; and

(v) no temporary occupation of any land shall be permitted under any written law relating to land.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under subsection (1). (Emphasis added.)

[78] Section 8 deals with rights of occupancy of aboriginal area and aboriginal reserve and it reads as follows:

A 8(1) The State Authority may grant *rights of occupancy of any land* not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve.

(2) Rights of occupancy may be granted:

B (a) to:

(i) any individual aborigine;

(ii) members of any family of aborigines; or

(iii) members of any aboriginal community;

C (b) free of rent or subject to such rents as may be imposed in the grant; and

(c) subject to such conditions as may be imposed by the grant, and shall be deemed not to confer on any person any better title than that of a tenant at will.

D (3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

[79] Now as for s 9, it prohibits dealings by aborigines with their land. It says this:

E No aborigine shall transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land except with the consent of the Director General and any such transaction effected without the Director General's consent shall be void and of no effect.

F **[80]** It is only too true that when there are prohibitions on the dealings and use of the land, whether it be aboriginal area or aboriginal reserve, there may well be attempts and some successful ones at that, where titles are issued for these lands to an individual who is a non-aborigine or a company.

G **[81]** Whether or not this is a case like the above, would be a matter that can only be determined in a trial commenced by a writ action where the relevant parties are before the court and the Director of Land and Mines as well as the state governmen would have to be made parties, whether they be joined by the H plaintiff or the defendant.

[82] At this stage we are not sure whether the land in question is *gazetted* as an aboriginal area under s 6 of the Act or an aboriginal reserve under s 7 of the Act or whether it is State Land occupied by the aborigines in which case it has I a fiduciary duty to *gazette* the area in question and a failure to do so would amount to a breach of fiduciary duty. The Court of Appeal in *Sagong Tasi* agreed with the High Court on this particular finding and proposition of law.

[83] Whether or not the state has knowledge or means of knowledge that

some of the aborigines of the Semelai Tribe had settled on the *ungazetted* area would be a matter that has to be decided at the trial. It is all the more pertinent when under s 6(2)(iii) with respect to an aboriginal area, '*no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines* normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General'. (Emphasis added.)

[84] The Court of Appeal sounded the warning of alienation of land in an aboriginal area without the consent of the Director-General as follows:

> [31] In my judgment, *what s 6 does is to prohibit the alienation or dealing by the State of land in aboriginal area to a non-aborigine. It merely reflects the permanent nature of the title vested in the plaintiffs.* And all that s 8 does is to enable the Government to create merely occupational rights not being higher than a tenancy at will. Further, *neither of these types of title can be dealt with in the absence of the Director General's consent.*
>
> [32] The crucial question which is overlooked by the submission of learned senior federal counsel is this: what title vests in the aborigines if the alienation permitted by s 6 never takes place? According to him, in such an event, the aborigines have nothing in the manner of any title to or interest in the land. With respect, that submission is devoid of any merit. If, in the absence of a specific alienation to him, an aborigine is to receive no interest in the land that he and generations of his forefathers have lived and worked upon, then the 1954 Act was a wasted piece of legislative action. Remember that the purpose of the 1954 Act was to provide socio-economic upliftment of the aborigines. Land being a very valuable socio-economic commodity, *it was the undoubted intention of the legislature not to deprive those in the class to whom the plaintiffs belong of the customary title existing at common law ...* (Emphasis added.)

[85] As for aboriginal reserve land there is an absolute prohibition under the Act under s 7(2)(iv) in that *'no land shall be alienated, granted, leased or otherwise disposed of except to aborigines* of the aboriginal communities normally resident within the reserve'. (Emphasis added.)

[86] The State and the Director of Land and Mines would be able to shed light and confirm or contradict if the Semelai people have been on the land for some six generations and whether there was a proper inquiry held by the Director General under the 1954 Act and the NLC, assuming the land is an aboriginal area, before a separate land title is issued to the now registered proprietor and leased to the plaintiff. If there is a lack of good faith it may well be that the state may not be able to rely on the protection of s 22 of the NLC which provides as follows:

> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, by him in *good faith and in the intended exercise of any power, or performance of any duty,* conferred or imposed on him by or under this Act. (Emphasis added.)

[87] The benefits of indefeasibility under s 340 of the NLC is subject to vitiating circumstances such as fraud, forgery, void and insufficient instrument and where the acquisition of the title or interest has been unlawfully acquired.

[88] Section 340 of the NLC reads as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the *title or interest was unlawfully acquired* by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law. (Emphasis added.)

[89] The concept of indefeasibility was explained by the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 as follows:

> [19] Section 340 of the NLC introduced into our land law the concept of indefeasibility of title. This is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was) in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (malaysia) Sdn Bhd* [1980] 2 MLJ 136; [1980] 1 LNS

55 observed that 'the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it.' Indefeasibility is defined by the Privy Council in *Frazer v Walker* [1967] AC 569 at p 580 to mean:

> The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of *The National Land Code, A Commentary* (Vol 2) by Judith Sihombing which reads:

> There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after the registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, *the difference between immediate and deferred indefeasibility hinges on the effect of registration vis a vis the title or interest.* (Emphasis added.)

[90] Whether or not this is a case falling within the vitiating circumstance of a title acquired unlawfully by the current registered proprietor is a matter of mixed finding of fact and law that can best be done at the trial in a writ action where there can be proper discovery of minutes of inquiry by the Director of Land and Mines and State Executive Council Meetings.

[91] Even if the plaintiff were to say that they are subsequent purchaser in good faith and for valuable consideration, that cannot be accepted at face value and has to be proved as there is a dispute as to whether the plaintiff knew that the aborigines in the Semelai tribe were already in occupation of the land. Section 5 of the NLC defines 'purchaser' to cover 'lessee' as well for it reads:

A "purchaser' means a person or body who *in good faith* and for valuable consideration *acquires* title to, or *any interest in land*'. (Emphasis added.)

[92] What we can conclude so far is that there are far more questions raised than we can possibly answer in an action under O 89 of the ROC 2012 which
B is summary in nature and where, as it is, there are conflicts in affidavit evidence from both parties. It would be an abuse of the court's process to use O 89 of the ROC 2012 summary procedure for ostensibly a matter where the aborigines living on the land may be permanently deprived of their land without any
C compensation at all. The fact that the defendants had not earlier applied for the OS to be struck out does not bar the defendants from arguing that the OS should, for the reasons already set out, be dismissed.

[93] In the recent Federal Court case of *Busing ak Jali & Ors v Kerajaan*
D *Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273; [2022] 3 CLJ 1, the Federal Court sent back for the High Court to make finding of fact after a trial where witnesses may be called and cross-examined as to whether there was Native Customary Rights ('NCR') created or existed on the alienated land which entitled the appellants to compensation (Case C) with respect to the
E natives claims against the third parties who are the Superintendent of Lands and Surveys, Miri Division and the State Government of Sarawak as third parties. See paras [167]–[168] of the judgment.

[94] Even where the plaintiff, at the High Court, as registered proprietor of
F the lease title in question, had succeeded in getting an eviction order, it was via a writ action where they had proceeded under O 14A for the ROC 2012 and where the High Court had held that based on the affidavit evidence, the disputed area was a primary forest in 1947 and 1963 with no proof of cultivation or settlement. See paras [17]–[19] of the judgment of the Federal
G Court.

[95] The instant case is not one where the court just wants to satisfy its curiosity by peeping behind the curtain of registration of title to find out the antecedents before alienation of the land to the registered proprietor. It is a case
H where, for compelling reasons, we must not summarily grant an order for eviction of the defendants as occupiers when prima facie it appears that the people of the Semelai tribe would be permanently deprived of their land without any compensation, not to mention adequate compensation.

I PRONOUNCEMENT

[96] We had therefore allowed the appeal of the appellants/defendants and set aside the order of the High Court and dismissed the OS, with liberty given to the respondent/plaintiff to file a writ action if so minded.

[97] We awarded costs of RM20,000 to the appellant here and below subject to allocator.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh